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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 972

ROBERT RAY SMITH)
)
Petitioner)
)
v)
)
UNITED STATES OF AMERICA)
)
Respondent)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert Ray Smith, by counsel, Palmer K. Ward, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in affirming the judgment of the United States District Court for the Southern District of Indiana, upon his conviction of the Mann Act in violation of Title 18, U. S. C., Section 2421.

OPINION OF THE UNITED STATES COURT OF APPEALS

The opinion of the United States Court of Appeals for the Seventh Circuit has not been officially reported but it is reproduced herein in Appendix "A" to this petition.

JURISDICTION

1. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 2, 1970.

2. A timely Petition for Rehearing was filed and overruled by the Court on October 16, 1970.

3. The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254 (1).

QUESTION PRESENTED

Was the introduction into evidence of so-called similar evidence of another admitted prostitute who testified that she had performed acts of prostitution

for the defendant and given him the proceeds of her acts of prostitution occuring at a time two years prior to the date alleged in the indictment, said testimony being wholly unrelated to the cause being tried to a jury, and said evidence being admitted, over the objection of the defendant, in the government's case in chief, so prejudicial to the defendant, as to require a reversal herein?

STATEMENT OF THE CASE

Petitioner was indicted by the Grand Jury for the Southern District of Indiana on June 26, 1968 and charged with a violation of Title 18, United States Code, Section 2421, commonly known as the Mann Act. The cause was tried by a jury which on June 25, 1969 returned a verdict of guilty.

The trial Court, over objection of the Petitioner, permitted one Wilma

Nell Thomas, in the government's case in chief, to testify that she was in Gary, Indiana with Petitioner in January of 1965 and further that in this same month and year that she engaged in acts of prostitution and gave her earnings to Petitioner. All of this testimony being two years prior to the alleged offense upon which the Petitioner was being tried by a jury.

At the conclusion of the evidence the Court gave a cautionary instruction that the evidence was admitted for the limited purpose of showing criminal intent.

Upon the verdict of the jury the Court sentenced the Petitioner to three (3) years imprisonment. Said judgment being reproduced herein as Appendix "B" to this petition.

ARGUMENT

We earnestly contend that the trial Court committed reversible error

when it permitted the witness Thomas to testify to matters that were not within the issues framed by the indictment herein. Over objection she was permitted to testify to a series of unrelated acts which occurred two years prior to the date alleged in the indictment. The Court attempted to give a limiting instruction at the conclusion of the evidence but we submit that this type of instruction was one similar to the instruction given in the case of Bruton v United States (1968) 391 U. S. 123, which instruction although clear and concise was found to be prejudicial to the defendant. As this Court said in Bruton, supra, at page 135:

> " It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless, as was recognized in Jackson v Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences

> of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. "

We further submit that the decision of the United States Court of Appeals for the Seventh Circuit in the instant case is in direct conflict with similar rulings by the United States Courts of Appeals for the Fourth and Fifth Circuits.

In the recent case of United States v Murvin (1970) 425 Fed 2d 1204, the United States Court of Appeals for the Fifth Circuit stated:

> " We agree that it was error to admit reputation testimony during the presentation of the government's case in chief, over objection of the defendant, who neither testified nor offerred any testimony in his own behalf. "

Admission of testimony concerning alleged law violations ten months prior to the offense upon which the defendant was being tried was condemned by the United States Court of Appeals for the Fourth Circuit in the case of Sutherland v United States (1937) 92 Fed 2d 305

at page 308 where the Court held:

> " Evidence of similar offenses committed at or about the same time is admissible when the question of intent, purpose, design or knowledge is involved. See Breedin v United States(C. C. A. 4th) 73 Fed 2d 778, 780 and cases their cited. But the other offenses as to which evidence is offerred must be so nearly related in time and place as to have some tendency to prove the commission of the crime charged. Simpkins v United States (C.C.A. 4th) 78 Fed 2d 594, 595, 597. Proof of finding whiskey on defendant's premises ten months before the offense for which he was being tried had no reasonable tendency to prove that offense; but it did have a tendency, coupled with the conflicting statements attributed to him, to prejudice him greatly in the eyes of the jury. "

CONCLUSION

For the reasons herein stated we respectfully pray the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review their final judgment and to settle the conflict between the circuits as to the question of the admission of evidence of other offenses

not in issue and too remote in time from the cause being tried.

Respectfully submitted,

Palmer K. Ward
919 Electric Bldg.,
Indianapolis, Indiana

Attorney for Petitioner.

APPENDIX "A"

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 18022

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ROBERT RAY SMITH,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

October 2, 1970

Before HASTINGS, *Senior Circuit Judge,* and CUMMINGS and PELL, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* Defendant, Robert Ray Smith, was indicted[1] for an alleged violation of the Mann Act, Title 18, U.S.C.A. § 2421[2]. He was tried to a jury,

[1] The body of the indictment reads:
"That on or about February 6, 1967, at Indianapolis, Indiana, in the Southern District of Indiana, ROBERT RAY SMITH, did knowingly and wilfully procure and obtain American Airlines ticket, Serial Number 0277431 to be used for the transportation in interstate commerce from Indianapolis, Indiana, to Chicago, Illinois, of a woman, that is, Christina Marie Cox, for the purpose of prostitution, debauchery and other immoral purposes in violation of Title 18, U.S.C., Section 2421."

[2] The relevant part of § 2421 reads:
"• • • Whoever knowingly procures or obtains any ticket or tickets, or any form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, • • • in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, • • • whereby any such woman or girl shall be transported in interstate or foreign commerce, • • •
"Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

found guilty and sentenced to a term of three years on the judgment rendered on the jury verdict. Defendant appeals therefrom. We affirm.

Appellant charges as his sole ground of prejudicial error, requiring the reversal of his judgment of conviction, that the trial court improperly permitted another prostitute to testify concerning similar acts of prostitution occurring at a time about two years prior to the date alleged in the indictment, such testimony allegedly being wholly unrelated to the cause on trial.

Defendant was represented at trial and on this appeal by competent privately employed counsel. He did not testify in his own behalf and introduced no evidence after the Government closed its case and rested. We have read the entire brief transcript of the evidence. It stands undisputed.

One Christina Cox testified that in December, 1966 she went to work for defendant as a prostitute and gave her earnings to him until some time in February, 1967. These acts took place in various places in Indiana, Illinois, Pennsylvania and Wisconsin. It was clearly established that defendant purchased the airline ticket in question for cash, gave it to her as charged in the indictment and generally paid for her transportation or transported her in her interstate prostitution activities for him.

The Government further established its case by the clear and undisputed testimony of special agents of the Federal Bureau of Investigation; airline, hotel and motel employees; and supporting documentary exhibits. It is not and could not be seriously contended that there is insufficient evidence to sustain the jury's verdict of guilt.

The challenged extra-indictment testimony was offered by the Government in concluding its case in chief. Over objection, one Wilma Nell Thomas was permitted to testify that beginning in January, 1965 she engaged in acts of prostitution for defendant and gave her earnings to him. The acts occurred in Gary and Marion, Indiana and in Dayton, Ohio.

The evidence was admitted by the trial court for the limited purpose of showing the criminal intent and pur-

pose of defendant in purchasing the airline ticket in question. The criminal intent of defendant under § 2421 was in issue and the Government had the burden of proof. Further, as the trial court observed, in evidence through the testimony of an FBI agent were defendant's statements that he had never engaged in the business of prostitution, had never acted as an agent for a prostitute and had never taken a girl across a state line, except on one occasion. The Thomas testimony served to impeach defendant's obviously false statements to this effect.

At the time the witness Thomas was first questioned concerning defendant's prior similar transactions, the trial court carefully and meticulously limited the consideration of such testimony by admonishing the jury at length that it could not be considered in determining whether defendant committed the acts charged in the indictment. The trial court further gave its Instruction No. 18 to the jury, following the conclusion of the evidence, in which it correctly stated again the rule concerning the limited use of such extra-indictment similar conduct.

Several factors stand out in this record. Witness Thomas was not a co-defendant in this case. Defendant's attempt to rely on the rule in Bruton v. United States, 391 U.S. 123 (1968) is misplaced. *Bruton* is inapposite to the instant case in this and several other respects. *Cf.* United States v. Lyon, 7 Cir., 397 F. 2d 505 (1968), *cert. den.*, Lyszczyk v. U.S., 393 U.S. 846. We also find Lovely v. United States, 4 Cir., 169 F. 2d 386 (1948), relied upon by defendant, distinguishable on its facts.

Criminal intent was in issue in this case. We find no abuse of discretion on the part of the trial court in permitting this limited use of the proffered evidence. Nor do we find any plain error affecting substantial rights of the defendant within the purview of Rule 52(b), Federal Rules of Criminal Procedure, Title 18 U.S.C.A.[1]

The defendant himself clearly "sharpened" the issue of criminal intent when he stated to the investigating officers that he had *never* been engaged in conduct proscribed by § 2421, *supra*. This court has frequently held in other

[1] See, United States v. Eddington, 7 Cir., 338 F. 2d 760 (1964), cert. den. 379 U.S. 818, and United States v. Krulewitch, 2 Cir., 145 F. 2d 76 (1944), and its progeny.

cases that evidence of similar offenses is admissible if it is closely related to the pattern of the offense charged. United States v. Marine, 7 Cir., 413 F. 2d 214, 216 (1969), and cases therein cited.

It is conceded, of course, that as a general rule, "evidence of prior criminal acts of an accused, which are not charged in the indictment or information, is inadmissible." United States v. Fierson, 7 Cir., 419 F. 2d 1020, 1022 (1969). But, see the cogent dissent of my Brother Cummings in *Fierson*, 419 F. 2d at 1024-25. As he so well observes, Rule 4-04(b) of the Proposed Rules of Evidence for the United States District Courts and Magistrates (Preliminary Draft, March 1969) "accords with present case law in making such an exception" to the general rule. We find such to be the situation in the instant case.

The question whether the events testified to by witness Thomas were too remote in point of time to be relevant was raised by appellant. Timeliness of prior events is but one of the factors to be considered by the trial court. In view of all the circumstances in evidence bearing on the issue in question, we have concluded that the trial court did not clearly abuse its discretion in this regard.

Finally, the record demonstrates that, aside from the challenged testimony of extra-indictment similar offenses, the guilt of defendant was undeniably established beyond all reasonable doubt. Defendant does not contend otherwise.

We find no prejudicial error as charged by appellant and his judgment of conviction will be affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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APPENDIX "B"

JUDGMENT

On this 30th day of July, 1969 came the attorney for the government and the defendant appeared in person and by his privately employed counsel.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of wilfully procuring and obtaining airline ticket to be used for transporting in interstate commerce a woman for the purpose of debauchery and other immoral purposes, in violation of 18 U.S.C. 2421, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representive for imprisonment for a period of

three (3) years.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 972

ROBERT RAY SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

An indictment returned in the United States District Court for the Southern District of Indiana charged that petitioner procured an airline ticket for the transportation in interstate commerce of one Christina Marie Cox, for the purpose of prostitution, in violation of 18 U.S.C. 2421. After a jury trial, petitioner was found guilty and was sentenced to imprisonment for three years (Pet. App. B). On October 2, 1970 the court of appeals affirmed (Pet. App. A).

The facts appear in the opinion below. At trial Miss Cox testified that in December 1966, she went to work for petitioner as a prostitute at various places in Indiana, Illinois, Pennsylvania and Wisconsin and that, on or about February 6, 1967, petitioner purchased and gave her the airline ticket in question (from Indianapolis, Indiana to Chicago, Illinois) for the purpose of having her engage in prostitution at her destination. An FBI agent testified to petitioner's pretrial statements that he had never engaged in the business of prostitution, had never acted as an agent for a prostitute and had never taken a girl across a state line, except on one occasion. Over petitioner's objection, Wilma Nell Thomas was permitted to testify as a government witness that beginning in January 1965, she engaged in acts of prostitution for petitioner in Indiana and Ohio and gave her earnings to him. The trial judge admitted this evidence for the limited purpose of showing the criminal intent of petitioner in purchasing the airline ticket in question and instructed the jury to that effect immediately, and to like effect in his final charge.

Petitioner contends that the trial court erred prejudicially in admitting Miss Thomas' testimony. Evidence of other illegal conduct similar to that charged in the indictment is competent, however, to show intent and purpose. See *e.g.*, *United States* v. *Pape*, 144 F. 2d 778, 780-781 (C.A. 2), certiorari denied, 323 U.S. 752; *United States* v. *Eddington*, 328 F. 2d 760, 762 (C.A. 7), certiorari denied, 379 U.S. 818; *Lindsey* v. *United States*, 227 F. 2d 113,

117 (C.A. 5), certiorari denied, 350 U.S. 1008. As the court below further held (Pet. App. A3), Miss Thomas' testimony was also properly admissible to impeach petitioner's statements to the FBI that he had never been engaged in conduct proscribed by 18 U.S.C. 2421. *United States* v. *Acuff*, 410 F. 2d 463, 466 (C.A. 6), certiorari denied, 396 U.S. 830; cf. *Walder* v. *United States*, 347 U.S. 62.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

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